
ANALYTICAL STUDY OF SUPREME COURT'S JUDGEMENT IN ANOOP BARANWAL V. UNION OF INDIA WITH RESPECT TO REFORMS IN THE APPOINTMENT OF ELECTION COMMISSIONERS

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ABSTRACT

The judgment of Supreme Court in *Anoop Baranwal v. Union of India*¹ came as a consequence of four writ petitions seeking a 'fair, just, and transparent process of appointing Election Commissioners'. The Petitioners sought support from the Constituent Assembly Debates and post-Independence reports of the Law Commission of India and other specialised committees, and judgements to argue that the scheme of Article 324 requires the Parliament to enact a law to establish a mechanism to appoint the Election Commissioners. The petitioners relied on the text of Article 324 which empowers the Election Commission of India to conduct. The existing process of appointing Election Commissioners arises out of Article 324, but it was a temporary arrangement to fill the gap until the Parliament laid down a legislation in this regard. However, no law has been made governing the appointment of Election Commissioners. Thus, there exists a vacuum. The petitioners argue that the Parliament's failure to create a law to effectuate this constitutional scheme is due to political interests. This also undermines the independence of the institution and goes against democratic principles. They assert that citizens' right to free and fair elections is being violated because the Election Commission is not independent.

On the other hand, the Union of India argues that no vacuum since the Constitution already outlines a procedure. According to Article 324(2) read with Article 74, the President appoints the Chief Election Commissioner and Election Commissioners based on the advice of the Council of Ministers. The Union of India has invoked the doctrine of separation of powers, stating that judicial intervention in the appointment of the Election Commissioners would amount to encroaching on the executive's functions. Additionally, the

¹ *Anoop Baranwal v. Union of India*, Writ Petition (Civil) No. 104 of 2015, Supreme Court of India

Union of India has argued that the possibility of better mechanisms for appointment cannot justify impinging on the existing constitutional scheme.

INTRODUCTION

After hearing a set of pleas seeking an independent system of appointment of the Election Commissioners outside the exclusive control of the executive, so as to ensure impartial operation of the Election Commission of India and protect its independence, the five-judge Constitution Bench, headed by Justice K.M. Joseph and comprising of Justices Ajay Rastogi, Aniruddha Bose, Hrishikesh Roy and C.T. Ravikumar has delivered the landmark judgement in the arena of electoral reforms. This judgement directing to change the mechanism by which India's top election officers are to be appointed is a very significant and it has the potential to have far-reaching implications on the transparency of the election conducted in India.

The Supreme Court of India on 2nd March 2023, in the case titled *Anoop Baranwal v. Union of India*, has directed an alteration in the appointment mechanism of the Chief Election Commissioner and Election Commissioners. The present mode of selection entails the President appointing the Chief Election Commissioner on the aid and advice of the Council of Ministers. The Supreme Court has ordered that until the Parliament enacts a law in this regard, the Chief Election Commissioner and Election Commissioners shall be appointed on the recommendation of a three-member high level committee comprising of the Prime Minister, the Leader of Opposition of the Lok Sabha, and the Chief Justice of India.

REASONING OF THE JUDGEMENT

Justice K.M. Joseph, writing for the majority, and Justice Ajay Rastogi, in his concurring judgement, follow a similar line of reasoning. First, they consider Article 324 in its historical context and find that the Constitution's framers intended to keep the Election Commission free from executive interference. However, since they could not agree on mechanism for appointment of the Election Commissioners, they left the matter to Parliament to resolve. Secondly, the Justices examined the expanding scope of powers, and functions of the Election Commission of India, and its importance in maintaining constitutional democracy through free and fair elections. Thirdly, they hold that the historical and structural arguments indicate a gap in the constitutional scheme, which leaves the Election Commission's independence

insufficiently protected. As a result, the Court steps in to fill this gap until Parliament passes a law to address the issue.

‘SUBJECT TO LAW MADE BY PARLIAMENT’

Article 324² of the Constitution establishes the Election Commission of India. Article 324 (1) vests the power of “superintendence, direction, and control of elections” to the Election Commission. Article 324(2) specifies that “the appointment of the CEC and other ECs shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.” Article 324(5) authorises the President to determine the conditions of service and tenure of office of the ECs, “subject to a law” made by Parliament. The Election Commission Act, 1991 was passed by Parliament to address Article 324(5). However, a law has never been passed to address the appointment process outlined in Article 324(2).

According to Justice K.M. Joseph in the majority judgement and Justice Rastogi in his concurring judgement, Article 324(2) ought to be interpreted consistently with the framing intent of the Constituent Assembly while drafting this Article. The legislative intent indicates a constitutional expectation that Parliament would pass a law that lays down a mechanism for appointing the CEC in a way that ensures their independence from the interference of the executive.

CONSTITUENT ASSEMBLY DEBATES

The proposed draft provision, Article 289, was eventually adopted and became Article 324 of the Indian Constitution. By closely reading the Constituent Assembly Debates of 15th & 16th June 1949³, it can be inferred there had been a consensus around the proposition that the Election Commission of India should be free from the control of the government and the independence of the Commission should be secured. This has been succinctly expressed by the Chairman of the Drafting Committee, Dr B.R. Ambedkar – “... *so far as the fundamental question is concerned that the election machinery should be outside the control of the executive government, there has been no dispute*⁴.” Another member of the Constituent Assembly, Pandit Hirday Nath Kunzru warned “... *by leaving a great deal of power in the hands of the President*

² The Constitution of India, Article 324

³ Book 3, Volume VIII, *Constituent Assembly Debates*

⁴ Book 3, Vol. VIII, *Constituent Assembly Debates*, Page 905

we may have given room for exercise of political influence on the appointment of the Chief Election Commissioner and other Election Commissioners...⁵

Although there was unanimous agreement on the idea of keeping the executive interference at bay, on the question of how this independence ought to be secured, members differed. Professor Shibban Lal Saksena move an amendment to draft Article 289 that the Election Commissioners would be appointed ‘*subject to confirmation of the 2/3rd majority in a joint session of the Houses of Parliament.*⁶’ While Dr. B.R. Ambedkar suggested an “Instrument of Instruction” to the President. However, they could not garner support for their proposals.

There was a consensus among the members that the power of appointment of the CEC should not be solely vested in the PM, as there was a risk of appointing someone with political bias. This apprehension of executive dominance could be addressed by giving the Parliament the authority to determine the process of appointment of the CEC and ECs. Dr B.R. Ambedkar drafted an amendment that reflected this consensus, and it eventually became Article 324 of the Constitution.

RECOMMENDATIONS OF VARIOUS COMMISSIONS ON THE MANNER OF APPOINTMENT

DINESH GOSWAMI COMMISSION, 1990⁷

The Committee recommended that the Chief Election Commissioner should be appointed by the President in consultation with the Chief Justice of India and the Leader of the Opposition, and that this process should be given statutory backing. The same criteria were to be applied to the appointments of Election Commissioners, along with consultation with the Chief Election Commissioner.

NATIONAL COMMISSION TO REVIEW THE WORKING OF THE CONSTITUTION, 2002⁸

The Commission, under the chairmanship of Justice M.N. Venkatachaliah, suggested that the appointment of the Chief Election Commissioner and other Election Commissioners should be

⁵ Book 3, Vol. VIII, *Constituent Assembly Debates*, Page 922

⁶ Book 3, Vol. VIII, *Constituent Assembly Debates*, Page 908

⁷ Dinesh Goswami Commission, 1990 Chapter II, Electoral Machinery, *Available at:* <https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>

⁸ National Commission to Review the Working of Constitution Report, 2002, *Available at:* <https://legalaffairs.gov.in/sites/default/files/chapter%204.pdf>

made on the recommendation of a body consisting of the Prime Minister, the Leaders of the Opposition in the Lok Sabha and the Rajya Sabha, the Speaker of the Lok Sabha, and the Deputy Chairman of the Rajya Sabha.

REPORT OF SECOND ADMINISTRATIVE REFORM COMMISSION, 2009⁹

The Commission recommended that a collegium should be constituted for the appointment of the Chief Election Commissioner and the Election Commissioners.

LAW COMMISSION OF INDIA (255TH) REPORT, 2015¹⁰

The Commission, chaired by Justice A.P. Shah, said the appointment of all the Election Commissioners should be made by the President in consultation with a three-member collegium consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha and the Chief Justice of India.

These reports clearly indicate the need for reforms in the process of appointment of the members of Election Commission.

EVOLUTION OF THE ELECTION COMMISSION AS A MULTI-MEMBER BODY

1989 NOTIFICATION

Until 1989, the Election Commission consisted of only the Chief Election Commissioner. In 1989, the Central Government changed tracks and sought to appoint Election Commissioners. The underlying purpose of this move seems to be to curb the powers of the Chief Election Commissioner who was single-handedly exercising the powers of the Election Commission. In 1989, by a notification issued under Article 324(2), the number of Election Commissioners (besides the Chief Election Commissioner) was fixed at two. By another notification, the President appointed the S.S. Dhanoa and V. S. Seigell as Election Commissioners as such.

1990 NOTIFICATION

Hitherto, the Election Commission had consisted of only one member, viz. the Chief Election Commissioner. With the addition of two more members, the smooth working of the Commission adversely affected. Accordingly, on 1st January 1990, the President issued two

⁹ Report of Second Administrative Commission, 2009, *Available at:*
<https://www.darpg.gov.in/arc-reports>

¹⁰ Law Commission of India, Report No. 255, Electoral Reforms
<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081635.pdf>

notifications under Article 324(2) rescinding the 1989 notifications creating the two posts of Election Commissioners and appointing two persons to these posts. In this way, from 1990, the Election Commission again reverted to a one-man body.

S. S. DHANOA V. UNION OF INDIA¹¹

The Supreme Court laid down an important proposition regarding the composition of the Election Commission. The Court held that 1990 notification as valid. Article 324(2) leaves it to the President to fix and appoint such the number of Election Commissioners as he may determine. The power to create the posts and abolish them is unfettered. However, the Apex Court observed that an institution like the Election Commission is entrusted with vital functions, it is necessary and desirable that these powers are not exercised by one individual.

1993 NOTIFICATIONS

In 1993, the Central Government again decided to convert the Election Commission into a multi-member body. Accordingly, two notifications were issued in this regard and the number of Election Commissioners was fixed to two.

T. N. SHESHAN V. UNION OF INDIA¹²

The incumbent Chief Election Commissioner, T. N. Seshan challenged the notifications as unconstitutional. The Supreme Court rejected the arguments of the Chief Election Commissioner and upheld the 1993 notification. The Court maintained that “the scheme of Article 324 clearly envisages a multi-member body.”

NATURE OF THE RIGHT TO VOTE

After Independence, the nature of the right to vote and the right to contest elections as laid down by the judgments has undergone changes.

Justice K.M. Joseph examines, with no clear conclusion, the tangled judicial history of the right to vote. A succession of early judgments held that the right to vote is purely a statutory right, and not a fundamental right.

In *NP Ponnuswami v. Returning Officer, Namakkal Constituency*¹³ it was held that the right to

¹¹ *SS Dhanoa v Union of India*, (1991) 3 SCC 567

¹² *TN Seshan v Union of India*, (1995) 4 SCC 611

¹³ *NP Ponnuswami v Returning Officer, Namakkal Constituency*, AIR 1952 SC 64

vote is not a civil right but is a creature of statute and subject to limitations imposed by it.

The right to vote and right to contest election is a statutory right and not a constitutional right has been reiterated in *Jamuna Prasad Mukherji v. Lachhi Ram*¹⁴, *Jyoti Basu v. Debi Ghosal*¹⁵, *Nalla Thampy Thera v. B.L. Shankar*¹⁶.

However, in *Anukul Chandra Pradhan v. Union of India*¹⁷, the above position was reversed, and it was held that the Right to Vote is not the gift of a legislation, but it flows from Constitution. Free and fair election is declared to be a basic feature of the Constitution, and thus no statute can negate the right to vote. Under Article 326, the right to vote is a constitutional right.

While it may be said that the right to vote or contest an election is not a Fundamental Right, it does not necessarily follow that a discriminatory election law cannot be challenged as a violation of the Fundamental Right of Equality under Article 14.

In the 21st century, this position has become more nuanced, with judgments holding that the freedom to vote in an election is protected by Article 19(1)(a) of the Constitution, but the right to vote is a “constitutional” right (located within Article 326, which guarantees that elections will be on the basis of universal suffrage). The precise implications of these distinctions in practice have yet to be worked out; but Justice Joseph attempts to do so by holding that the constitutional right to vote flows from Article 326 of the Constitution, and that restrictions upon that right must also flow from Article 326.¹⁸

POWERS AND FUNCTIONS OF ELECTION COMMISSION

1. REGISTER POLITICAL PARTIES

The Election Commission registers political parties for the purpose of elections and grants them the status of national and state parties based on their poll performance.

2. ELECTION SYMBOLS

¹⁴ *Jamuna Prasad Mukhariya v Lachhi Ram*, AIR 1954 SC 686

¹⁵ *Jyoti Basu v Debi Ghosal*, AIR 1982 SC 983

¹⁶ *P. Nalla Thampy Thera v. BL Shankar*, AIR 1984 SC 135

¹⁷ *Anukul Chandra Pradhan v Union of India*, (1997) 6 SCC 1

¹⁸ Rushil Batra “Decoding the Supreme Court’s Election Commission Judgment – II: On the Separation of Powers” Available at: <https://indconlawphil.wordpress.com/2023/03/04/decoding-the-supreme-courts-election-commission-judgment-ii-on-the-separation-of-powers-guest-post/>

Rule 5(1) of the Rules framed by the Central Government under the Representation of People's Act, 1951 empowers the Election Commission to allot the symbols which candidates and political parties may use for elections. The Supreme Court in *Sadiq Ali v. Election Commission*¹⁹ has explained that in India, allotment of symbols is necessary so that the illiterate voter may identify the candidates.

3. SCRUTINISE NOMINATION

It is the function of the Election Commission to scrutinise the nomination of the candidates by requiring bona fide documents and information from them.

*Union of India v. Association for Democratic Reforms*²⁰: The Supreme Court directed the Election Commission to issue certain directions to candidates to file an affidavit detailing information about themselves. This was done to stop criminalisation of politics.

4. SCHEDULE AND RESCHEDULE ELECTIONS

The Election Commission may notify the dates and schedule elections. The Election Commission also has power to review its decision as to the expediency of holding poll on a particular date.

*Digvijay Mote v. Union of India*²¹: If the Election Commission is of the opinion that having regard to the disturbed conditions in a State, or a part thereof, free and fair elections cannot be held, it may postpone it.

5. CANCEL POLLS AND ORDER REPOLLS

The Election Commission may cancel polls in the event of rigging, booth capturing, violence, and other irregularities. The Commission can order re-poll for the whole constituency under compulsion of circumstances.

*Mohinder Singh v. Chief Election Commission*²²: Article 324 confers on the Election Commission power to cancel the poll in a constituency and order a fresh poll therein because of hooliganism and breakdown of law. The Commission should exercise this power according to the principles of natural justice.

¹⁹ *Sadiq Ali v Election Commission*, AIR 1972 SC 187

²⁰ *Union of India v Ass. for Democratic Reforms*, (2002) 5 SCC 294

²¹ *Digvijay Mote v Union of India*, (1993) 4 SCC 175

²² *Mohinder Singh Gill v Chief Election Commissioner*, (1978) 1 SCC 405

6. DISQUALIFICATION OF MEMBERS OF PARLIAMENT OR STATE LEGISLATURE

The Commission has the function of advising the President or the Governor on the question of disqualification of any member of Parliament [Article 103(2)] or a member of State Legislature [Article 192(2)].

Under Section 8A of the Representation of People's Act, 1951, the President has to determine whether a person shall be disqualified and for what period. In this situation, President must act according to the opinion of the Election Commission.

7. CODE OF CONDUCT

The Election Commission is empowered to determine the code of conduct to be observed by the parties and the candidates at the time of elections.

*Election Commission of India v. AIADMK*²³: The Election Commission banned the use of loudspeakers between 7 pm and 8 am for electioneering purposes. Although the Supreme Court relaxed the number of hours when the use of loudspeaker was prohibited but upheld the decision of the Election Commission.

8. ENSURE FREE AND FAIR ELECTIONS

It is the duty of the Election Commission to supervise the machinery of elections throughout the country to ensure free and fair elections.

*Common Cause – a Registered Society v. Union of India*²⁴: The Supreme Court held that under Article 324, the Commission can issue suitable directions to bring transparency and ensure free and fair elections. It has the power to issue directions requiring the political parties to submit the details of the expenditure incurred during the elections.

9. ELECTION COMMISSION AS A TRIBUNAL

The Election Commission is empowered to act as a court for settling disputes related to granting of recognition of political parties and allotment of election symbols to them.

*APHL Conference, Shillong v. WA Sangma*²⁵: The Supreme Court held that THE Commission

²³ *Election Commission v AIADMK*, (1994) Supp (2) SCC 689

²⁴ *Common Cause v Union of India*, (1996) 2 SCC 752

²⁵ *APHL Shillong v MA Sangma*, (1977) 4 SCC 161

is a tribunal while deciding such disputes.

*Uma Ballav Rath v. Maheshwar Mohanty*²⁶: Cancellation of an allotted symbol to a political party is a quasi-judicial matter and the affected party must be given a hearing before making any such order.

CONCLUSION

WHETHER THERE EXISTS A VACUUM IN CONSTITUTIONAL SCHEME?

The legislative history of the term “subject to the provisions of any law made by Parliament” in Article 324(2) carries with it a constitutional expectation that Parliament would legislate, and the law would guarantee the independence of the Election Commission from executive control.

No law, however, came to be enacted by Parliament. Therefore, there exists a vacuum in the constitutional scheme that governs the appointment of the Chief Election Commissioners and Election Commissioners.

WHETHER THIS VACUUM IMPINGED ON INDEPENDENCE OF ELECTION COMMISSION?

The present role and functions of the EC make it the body tasked with actualising the constitutional right to vote and safeguarding democracy through the conduct of periodic elections. The Election Commission can be characterised as a ‘fourth branch institution’.

If Article 324(2) is read with Article 74 CEC and ECs are to be appointed by the President on the aid and advice of the Prime Minister and Council of Ministers. This impinges on the independent character of Election Commission and makes way for executive interference.

WHETHER GAP HAS BEEN FILLED BY THIS JUDGEMENT?

The judgment of the Supreme Court in *Anoop Baranwal v. Union of India* has laid down a mechanism for filling this gap by making the appointment of CEC and ECs subject to recommendations of the PM, Leader of Opposition and CJI until a law is made by the Parliament.

²⁶ *Uma Ballav Rath v. Maheshwar Mohanty*, (1999) 3 SCC 357